

Exhibit 9

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MARVEL WORLDWIDE, INC.,
MARVEL CHARACTERS, INC. and
MVL RIGHTS, LLC,

Plaintiffs,

-against-

LISA R. KIRBY, BARBARA J. KIRBY,
NEAL L. KIRBY and SUSAN N. KIRBY,

Defendants.

Civil Action No. 10-141 (CM) (KF)

[Hon. Colleen McMahon]

[ECF Case]

**DECLARATION OF JAMES F. STERANKO IN SUPPORT OF DEFENDANTS'
MOTION FOR SUMMARY JUDGMENT AND DEFENDANTS' OPPOSITION
TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT**

I, James F. Steranko, hereby declare as follows:

1. I am familiar with the facts set forth below and make this declaration in support of defendants' motion for summary judgment and defendants' opposition to plaintiffs' motion for summary judgment. The facts set forth herein are known to me of my own personal firsthand knowledge and, if called as a witness, I could and would testify competently thereto under oath.

2. I am a longtime comic book artist and historian. I am the author of the two-volume The Steranko History of Comics, for which I was awarded the 1970 Shazam Award for Outstanding Achievement by an Individual by the Academy of Comic Book Arts. I also was inducted into the Will Eisner Comic Book Hall of Fame in 2006. Wizard Magazine, a comic industry publication, has credited me as The Fifth Most Influential Comics Artist in the History of the Form. Michael Chabon cited me as an inspiration for his Pulitzer Prize-winning novel, *The Adventures of Kavalier & Clay*.

3. I broke into the comic book business in 1966 when I sold stories to editor Joe Simon at Harvey Comics. Simon was spearheading a new line of superhero comics at Harvey under the Harvey Thriller banner, and I sold stories I wrote to Harvey, which published them in its *Spyman* Nos. 1 and 2 and *Double-Dare Adventures* No. 1.

4. I then sold stories and artwork on a freelance basis to Marvel for its superspy Nick Fury feature in *Strange Tales* Nos. 151 through 168 (December 1966 to May 1968) and then for its stand-alone *Nick Fury, Agent of SHIELD* comic book Nos. 1 through 7 (June 1968 to December 1968). I also sold Marvel stories and artwork that were published in *Captain America* Nos. 110, 111 and 113 (February, March and May 1969), *X-Men* Nos. 50 and 51 (November 1968 and December 1968), *Tower of Shadows* No. 1 (September 1969) and *Our Love Story* No. 5 (June 1970), and artwork for Marvel's *The Incredible Hulk Special No. 1* (October 1968), *X-Men* No. 49 (October 1968), *Doc*

Case 1:11-cv-07957-LAK-KNP Document 80-94 Filed 05/19/23 Page 4 of 8

Savage Nos. 2 and 3 (December 1972 and February 1973), *Shanna the She-Devil* Nos. 1 and 2 (December 1972 and February 1973), *Supernatural Thrillers* Nos. 1 and 2 (December 1972 and February 1973) and *Fantastic Four* Nos. 130 through 132 (January 1973 through March 1973).

5. In total, I sold stories and artwork to Marvel on a regular basis from 1966 to 1973. I stayed busy with other projects as well. In 1969 I formed my own publishing company, Supergraphics, through which I published in 1970 and 1972 The Steranko History of Comics. I sold to Warren Publishing the artwork for the cover of *Eerie* No. 25 (January 1970). Also in 1970, I worked with writer Byron Preiss on *The Block*, an anti-drug comic book that was given out at elementary schools across the United States. In 1972 I began publishing through Supergraphics the magazine *Comixscene*, which became *Mediascene* in 1973 and later, *Prevue* magazine. I also sold stories and artwork to DC Comics, Archie Comics, Baronet Publishing, Eclipse, HM Communications, Inc., Image, Radical Comics and Vanguard Productions, among others.

6. I was awarded the Alley Award in 1968 for Best Pencil Artist; my cover for *Nick Fury, Agent of SHIELD* No. 6 was given the Alley Award that same year for Best Cover, and the *Nick Fury, Agent of SHIELD* title was named to the Alley Awards' Hall of Fame. In 1969, my cover for *Captain America* No. 113 won the Alley Award for Best Cover, and my story "At the Stroke of Midnight" for *Tower of Shadows* No. 1 was given the Alley Award for Best Feature Story. In 1973, I became the founding editor of Marvel's official fan magazine, *FOOM*.

7. I understand from press coverage of this case that Marvel is claiming that the artwork created by Jack Kirby and other freelance artists in the 1960s was "work made for hire."

8. I neither signed nor was offered a contract when I sold my stories and artwork to Marvel in the 1960s and the early 1970s. In this period no one at Marvel informed me either before or after I had created stories and artwork at my own expense

that Marvel somehow owned it at inception as "work for hire." Given Marvel's silence as to "work for hire" during this period, I sincerely doubt that even Marvel considered the material it bought by the page from freelancers to be "work for hire." In fact, I do not believe that I, the other freelancers, Marvel's editor, Stan Lee, or Marvel's small staff were even familiar with the term "work for hire" in the 1960's or early 1970's.

9. At that time, I understood and the people I dealt with at Marvel appeared to understand simply that I was selling and the publisher was purchasing my freelance work. It would not have been credible then and it is not credible now to say that the work I sold to Marvel or to the other comic book publishers in those days was "work for hire," owned by the publisher from the moment of its creation.

10. During this period I wrote and drew comic book stories at my own studio-residence and minimally interacted with Marvel until I submitted my material for acceptance. With few exceptions, I plotted, wrote, drew, inked and colored the works I created which were published by Marvel. I determined my own hours of work, usually into the night, and paid for my own overhead, research materials and art supplies (pencils, brushes, ink, etc.) with which I created the material. Marvel did not reimburse me for any of these expenses, including my travel expenses (gas, tolls, parking) when I drove from out of state to their offices. Marvel and the other comic book companies also did not provide me with any kind of vacation pay, sick pay, or health benefits, nor did they withhold money from my checks for tax purposes. I had to handle all of this on my own, with no financial security.

11. It was understood that Marvel had the option to purchase or reject my work (as they did on several occasions), and that I had no contract with them, so I was free to sell my work to any other publisher in a similar manner. It would be untrue to say now that Marvel owned the material I created in this fashion as "work for hire" from the moment my pencil touched paper. This did not match up with the industry standard, reality or conduct of freelancers and/or publishers at this time.

12. On the backs of many of the checks I received from Marvel in the 1960s and 1970s was a stamped legend which stated that by endorsing the check, I was assigning to the publisher all rights in the work, including the copyright. Nowhere did the phrase "work for hire" or "work made for hire" appear.

13. As was typical for the time, I was paid by Marvel and the other comic book companies on a per-page basis for the pages Marvel purchased, rather than a straight salary or on a per-project basis. Payment, of course, was contingent on the approval of Marvel's editor of the completed work, and Marvel paid freelance artists only for those pages of material it accepted.

14. In those days we worked without any tangible guarantee from the publishers, and shouldered the financial risk of creating our own material. Marvel also did not pay freelancers for the additional time of revising their artwork to Marvel's satisfaction before Marvel would purchase it. It was clear that we were not being paid for our services or time, but that Marvel was buying a finished product from us.

15. Sometime in the early 1980s, Marvel suddenly began returning original artwork to freelancers, including to me. It was my understanding at that time that it had come to light that comic book publishers in California were withholding/paying sales tax on their purchase of freelance artwork, and that first DC Comics, and then Marvel, became concerned that if it did not return to freelancers their original artwork, it ran the risk of owing a gigantic sum in back sales tax to Albany, NY.

16. I, and the other freelancers, welcomed the return of our artwork as it provided a source of income. However, Marvel used this as leverage and conditioned the return of such artwork on our signing release forms drafted by Marvel's attorneys. The releases re-characterized everything published by Marvel years earlier as "work made for hire." I disagreed with this and doubted its legality, but ultimately signed the release as

Marvel would not have otherwise returned my original artwork.

I declare under penalty of perjury that to the best of my knowledge the foregoing is true and correct.

Dated: March 24, 2011



James F. Steranko

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing was served electronically by the Court's ECF system and by first class mail on those parties not registered for ECF pursuant to the rules of this court.

Dated: March 25, 2011

Respectfully submitted,
TOBEROFF & ASSOCIATES, P.C.

/s/ Marc Toberoff

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